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In the Supreme Court of the United States

OCTOBER TERM, 1973

CASE NO. 73-391

BEHRING PROPERTIES, INC., BEHRING CORPORATION, L. T. AHRENHOLZ, AND MARY L. AHRENHOLZ,

Petitioners,

vs.

SUN OIL COMPANY,

Respondent.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

The questions presented as stated in the Petitioners' Brief will be restated by the Respondent to demonstrate the questions properly presented by their Petition:

I. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO REVIEW A CLEARLY CORRECT APPLICATION OF STATE LAW BY THE COURT BELOW.

II. WHETHER THE DECISION BY THE COURT BELOW THAT RESPONDENT WAS ENTITLED TO A DIRECTED VERDICT CONSTITUTES A DENIAL OF THE RIGHT TO TRIAL BY JURY.

III. WHETHER THE PRINCIPLES OF EQUAL PROTECTION OR DUE PROCESS ARE VIOLATED BY A COURT CORRECTING UPON REHEARING A MISTAKE OF FACT MADE IN THE INITIAL OPINION.

COUNTER-STATEMENT OF THE CASE

Petitioners' convoluted statement of the case bears no relation to what actually transpired. For this reason, Respondent will recite the facts by quoting from the opinion in this cause of the United States Court of Appeals for the Fifth Circuit.

> "This suit arose out of a proposed but abortive sale of Florida real estate to Sun Oil for a filling station site. Behring, the owner, executed and delivered to

Sun a proposed agreement of sale on Sun's form, to be sent to Sun's home office for its approval and execution. Before Sun had acted Behring conveyed by warranty deed to Ahrenholz for a lesser consideration than it was to receive from Sun. The deed recited: 'The foregoing land is conveyed subject to that certain Agreement of sale dated the ____ day of _____, 1969 between the Grantor herein and Sun Oil Company.'

Paragraph 9 of the proposed agreement provided:

> 9. SETTLEMENT: Settlement shall be held on or before the 15th day of July A.D. 1969, unless Seller is unable to convey said premises to Buyer in accordance with paragraph 5 hereof or Seller is unable to obtain the permits and licenses provided for in paragraph 8 hereof, in which event or events Buyer shall have the right and privilege, at its option, upon written notice to Seller, to (a) extend the date of settlement for a period of 180 days from the aforesaid date in order to afford an opportunity to clear any defects in the title, in accordance with said paragraph 5 hereof, and/or to permit Buyer to obtain the permits and licenses provided for in paragraph 8 hereof, or (b) cancel this agreement, whereupon all right of the parties shall cease and determine. Buyer may also extend the date of settlement for the above period of time if Buyer is unable to obtain a satisfactory survey of said premises by date of settlement . . .

Sun executed the document on condition that the legal description be corrected, a later closing date be negotiated, and a provision added that a street right of

way would be dedicated by Behring and accepted by the county. Sun withheld delivery pending determination of whether these changes were agreed upon. Behring's representative informed Sun of the conveyance to Ahrenholz, and secured Ahrenholz's consent to make changes. The representative corrected the legal description. In paragraph 9 he struck through '15th' and 'July' and in lieu thereof inserted '25th' and 'Sept.' He added a separate clause requiring dedication and acceptance of the right of way. He initialed all the changes. With these changes made, Sun delivered the agreement, and the contract, in its amended form, became effective. Neither then nor later did Ahrenholz execute the Behring-Sun agreement, nor did anyone sign it on his behalf. It was never assigned to Ahrenholz nor did he ever assume Behring's obligations thereunder. He simply assented to changes in a proposed agreement to sell the land of which he had become owner, to which agreement he recognizes his title became subject when the agreement was consummated.

By letter to Behring dated September 24, Sun gave notice to Behring that a building permit, provided for in paragraph 8 and referred to in paragraph 9, had not been received, nor had Sun been assured of the dedication and acceptance of the right of way, and it was, therefore, extending the date of settlement for not to exceed 180 days beyond September 25.

From then until February, Sun and Behring's counsel and representatives dealt with each other about the property. The building permit matter was soon resolved. Sun discovered what it contended were clouds on the title. Some of these Behring's counsel acknowl-

edged were encumbrances violating Behring's obligation under the agreement to convey a good and marketable title free of liens, easements and restrictions and insurable by a title insurance company. The existence of others was undisputed but not their effect. The right of way was at first not dedicated, then later was dedicated, but never accepted by the county. In short, before and after September 25, at least until late December or early January, Sun and Behring, working together, were attempting to get the transaction into satisfactory form to close. Counsel for Behring did, however, repeatedly ask that a closing date be set, and objected to what he considered to be dilatoriness by Sun.

On February 20, before the expiration of 180 days from September 25, Ahrenholz notified Sun that its delay in closing was unjustified and he considered Sun had breached the contract. Shortly before expiration of 180 days Sun tendered performance. Neither Behring nor Ahrenholz appeared at the time and place designated for closing. By that time most, if not all, of the defects in title had been either removed or acceded to by Sun, but the dedication of the right of way had not been accepted by the county.

Sun sued Ahrenholz and Behring for specific performance. Ahrenholz counterclaimed for breach of contract and demanded a jury. Behring counterclaimed for an equitable lien to protect its interests. The court ordered all issues tried by jury. The jury found in favor of defendants on the claim for specific performance and awarded Ahrenholz damages of $7,500 on his counterclaim." (App. 4-8 of Petitioners' Brief)

The United States Court of Appeals for the Fifth Circuit reversed this judgment, holding as a matter of law that the contract had not been breached and that Sun Oil, accordingly, was entitled to specific performance. The cause was remanded by the Fifth Circuit with directions to the Trial Court to grant specific performance to Sun Oil.

POINT I

WHETHER THIS COURT SHOULD GRANT CERTIORARI TO REVIEW A CLEARLY CORRECT APPLICATION OF STATE LAW BY THE COURT BELOW.

It is obvious from Petitioners' own statement of Question I that their sole claim is that the United States Court of Appeals for the Fifth Circuit misapplied or misconstrued the applicable Florida law pertaining to agency. This Court has held that questions of the proper application of state law to non-federal questions simply do not merit a grant of certiorari. See, e.g., *Commissioner of Internal Revenue v. Bosch*, 387 U.S. 456 (1967), and cases cited therein at 462.

Moreover, the Fifth Circuit correctly applied the Florida Law of Agency. The cases cited by Petitioner, while correct statements of certain abstract propositions of law, have no application to the case at bar. In fact, *Ball v. Yates*, 29 So.2d 729, 158 Fla. 521 (1946), clearly states a proposition of law which, when applied to the facts at bar, are clearly consistent with the holding of the Fifth Circuit. There it was held that one who deals with a special agent

or an agent who has only special authority to act for his principal, is not justified in relying upon any apperance of authority except that which is directly deducible from the nature of the authority actually conferred. The Fifth Circuit in its opinion dated June 6, 1973 denying the Petition for Rehearing, stated that for purposes of assenting to the changes in the proposed contract, Ahrenholz made Behring's representative his own representative. Petitioner does not quarrel with this statement. Accordingly, the agent did exactly what he was authorized to do by assenting to certain changes. Therefore, this is not a question of a special agent exceeding his authority, as urged by Petitioner, since the special agent, Behring's representative, did precisely what he was authorized to do by assenting to a change in the proposed contract. What we are really faced with here is a principal imposing secret and unusual restrictions upon the authority of an agent. Where this occurs the unusual restrictions must be communicated to persons dealing with the agent. In these circumstances, if such unusual restrictions are not communicated to the third party, the principal is bound. See *Standard Oil Company v. Nickerson*, 138 So. 55, 103 Fla. 701.

POINT II

WHETHER THE DECISION BY THE COURT BELOW THAT RESPONDENT WAS ENTITLED TO A DIRECTED VERDICT CONSTITUTES A DENIAL OF THE RIGHT TO TRIAL BY JURY.

Petitioners' complaint under this question is only that the United States Court of Appeals for the Fifth Circuit improperly directed a verdict for Respondent. If an im-

properly directed verdict amounted to a denial of the right to a trial by jury, any directed verdict could be turned into a constitutional question. This is simply not the law. The cases are legion that a directed verdict is not an impairment to the right to trial by jury. See, e.g., *Galloway v. United States*, 319 U.S. 372 (1943); *Lyon v. Mutual Benefit Health and Accident Association*, 305 U.S. 484 (1939); *Coughran v. Bigelow*, 164 U.S. 308 (1896).

POINT III

WHETHER THE PRINCIPLES OF EQUAL PROTECTION OR DUE PROCESS ARE VIOLATED BY A COURT CORRECTING UPON REHEARING A MISTAKE OF FACT MADE IN THE INITIAL OPINION.

Question Number III as stated by Petitioners is a distortion of the record. The United States Court of Appeal for the Fifth Circuit corrected its error in the opinion on rehearing (Appendix A to the Petitioners' Brief) and stated that the stipulation had no impact upon the result:

> "By petition for rehearing appellees correctly point out that our opinion erroneously stated that by formal pre-trial stipulation the parties agreed that Ahrenholz knew of and agreed to and ratified the change in the closing date in the contract. See also footnote 7 of our opinion. Such a stipulation was proposed by plaintiff but apparently not accepted by the defendants. The absence of a consummated stipulation does not, however, change the result." (App. 2 to Petitioners' Brief)

CONCLUSION

The Petition for Writ of Certiorari does not present any question which should be heard by this Honorable Court. Accordingly, the Petition should be denied.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served by mail upon ROBERT ORSECK, ESQUIRE, Second Floor, Concord Building, 66 West Flagler Street, Miami, Florida 33130; PREDDY, HADDAD, KUTNER AND HARDY, Fifth Floor, Concord Building, 66 West Flagler Street, Miami, Florida 33130; and PODHURST, ORSECK & PARKS, P.A., Second Floor, Concord Building, 66 West Flagler Street, Miami, Florida 33130, this ____ day of September, 1973.

_____

Of Counsel